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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 498

UNITED STATES OF AMERICA,

Petitioner,

v.

WALLENIUS BREMEN, G.M.B.H., OWNER OF THE M/V MARTHA,

Respondent.

BRIEF IN OPPOSITION

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INDEX

	Page
Question Presented	1
Reasons for Denying the Petition	1
Conclusion	4

CITATIONS

Treadwell Construction Co. v. *United States*, 372 U.S. 772 (1963)	2
Weyerhaeuser S. S. Co. v. *United States*, 372 U.S. 597 (1963)	1, 2

TREATISE

Larson, *Workmen's Compensation Law*	3

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QUESTION PRESENTED

Does the exclusive remedy provision of the Federal Employees Compensation Act bar a claim of a third party for indemnity against the Federal Government for damages arising out of an injury to an employee of the Federal Government.

REASONS FOR DENYING THE PETITION

The decision of the Court of Appeals is correct and conforms with the decisions of this Court in *Weyerhaeuser S.S. Co.* v. *United States,* 372 U. S. 597 (1963),

and *Treadwell Construction Co.*, v. *United States*, 372 U. S. 772 (1963), vacating and remanding *Drake* v. *Treadwell Construction Co.*, 299 F.2d 789 (3rd Cir. 1962). In *Weyerhaeuser* this Court found that the provision of the Federal Employees' Compensation Act was not intended to affect the rights of third parties in suits against the Government, and it held that the rule of divided damages in a maritime collision was unaffected by this legislation. In *Treadwell Construction Co.* v. *United States* this Court considered an action for indemnity and contribution by a third party against the United States which did not involve the admiralty rule of divided damages, and it granted a petition for a writ of certiorari, vacated the judgment of the Third Circuit Court of Appeals and remanded the case to the district court for further consideration in light of its decision in *Weyerhaeuser*.

The decision in *Weyerhaeuser* is not distinguishable from the facts in this case simply because *Weyerhaeuser* involved the admiralty rule of divided damages. The controlling conclusion in *Weyerhaeuser* is its finding that Congress did not intend the exclusive remedy provision of the Federal Employees' Compensation Act to bar actions by third parties against the Government. The Federal Employees' Compensation Act withdraws any other remedy a Government employee might have against the Government; however, the same act provides a remedy for the employee and is thus a substitute for that which is withdrawn. On the other hand the Federal Employees' Compensation Act provides no remedy for a third party where there is not any personal relationship with the employee; thus, this act should not be construed as withdrawing any third party's remedy where no comparable benefit has been bestowed. The distinction should, therefore, rest solely on whether

a cause of action has been replaced by a comparable benefit under the Federal Employees' Compensation Act.

Of course, a cause of action must rest on its own merits, and with this in mind the Court of Appeals has remanded this matter to the District Court for consideration of other issues which arose on the pleadings either by summary procedures or by trial. Consequently, the decision of the Court of Appeals is not final and may very well be disposed of in favor of the petitioner. To grant a writ of certiorari at this point may require the parties to bear needless expense and be exposed to unnecessary delay.

Furthermore, the Court may be faced with the necessity of disposing of this matter without reaching the conflict which apparently exists between the Fourth and Ninth circuits. In addition to holding that the exclusive remedy provision of the Federal Employees Compensation Act is not a bar to a third party action against the Federal Government, the Fourth circuit in this case held that the exclusive remedy provision was not a bar to the right of action which is based on an independent duty running between the United States and a third-party. Even in jurisdictions which treat similar exclusive remedy provisions in other workmen's compensation statutes as barring third party actions, it has been held that where a third party's cause of action is based on a duty running between it and the employer the exclusive remedy provision is not a bar. Larson, *Workmen's Compensation Law* §76.30 *et seq.* Therefore, if a writ of certiorari is granted the Court will be presented with a matter which is not final and which may not present an opportunity to resolve the conflict of which the petitioner complains.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
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